



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

## **FACTUAL HISTORY**

On December 17, 2017 appellant, then a 47-year-old federal air marshal, filed an occupational disease claim (Form CA-2) alleging that, on October 6, 2017, the employing establishment involuntarily placed him on sick leave for 280 hours and directed him to seek a psychiatric examination which revealed that he had an adjustment disorder caused by occupational stressors. He noted that he first became aware of his condition and its relationship to his federal employment on November 22, 2017. On the reverse side of the claim form, the employing establishment noted that appellant was last exposed to the conditions alleged to have caused his condition on October 7, 2017 and he returned to work on December 1, 2017.<sup>3</sup>

In a development letter dated December 27, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

The employing establishment did not respond to OWCP's December 27, 2017 request for information.

In a January 7, 2018 letter, appellant responded to OWCP's development letter. He contended that the employing establishment retaliated against him by failing to submit documentation and medical evidence supporting his claim. On October 6, 2017 the employing establishment ordered appellant not to enter its facilities and forced him to exhaust 280 hours of his sick leave until he was able to seek and personally pay a nonagency psychiatrist to examine his mental health. Appellant asserted that the employing establishment also revoked his agency-issued firearm in public by sending two uniformed federal air marshals who wore body armor labeled "POLICE" and exposed firearms in exterior holsters in black Suburban vehicles equipped with red and blue emergency lights to a grocery store parking lot in his town. He contended that the employing establishment immediately placed him back on full duties after it received a medical report by Dr. Kiran Iqbal, a Board-certified psychiatrist, who concluded that its directive was retaliatory. Appellant asserted that a current federal air marshal told him that years ago the employing establishment had directed her onto paid leave and to undergo a paid psychiatric examination as a result of "four-hand gossip." She believed that the employing establishment was retaliating against him. Appellant had a 15-year ongoing whistleblower retaliation case against the employing establishment and he prevailed against its appeal to the U.S. Merit Systems Protection Board (MSPB), U.S. Court of Appeals, and the U.S. Supreme Court. He noted that numerous mainstream media outlets had reported the Supreme Court's affirmation of his case and

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<sup>3</sup> On January 1, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) seeking compensation for disability from work from October 7 to November 30, 2017.

his 2003 protected disclosures which had alarmed congressional leaders. Appellant contended that since the employing establishment was forced to retroactively reinstate him in 2015, it used several methods to gaslight him. He stated that the supervisor filed a complaint accusing him of being a homicidal "racist." It was determined that the complaint was unfounded and the supervisor had committed perjury in an affidavit. The employing establishment failed to give appellant substantive duties for six months as he had no firearms, medical, or top secret clearance restrictions. During four of those months, he sat in an empty and windowless room and behind a printer table with no partition, telephone, or drawers. He noted that the employing establishment criminal investigators were currently probing appellant for his 2010 disclosures regarding a federal air marshal who was terminated, reinstated, and then again faced a second termination until she began having sexual relations with the married deciding official who had removed him from employment in 2006. Appellant asserted that he was currently in his third involuntary redirected assignment after a supervisor complained that it was impossible to remain covert during flight missions. He recounted that on May 24, 2016 a supervisor filed a complaint with an Equal Employment Opportunity investigator indicating that appellant's lack of substantive responsibilities was having a negative effect on him and other federal air marshals who observed him sitting around all day with nothing significant to do since he had been forced into an involuntary redirected assignment. One of appellant's rating supervisors who attempted to shield him from retaliation was demoted to a flying federal air marshal. Appellant noted that his lateral and promotional applications had been rejected despite the testimony of his deciding official that he had an unblemished record and was consistently an exemplary officer, and his well-documented performance record. He contended that his fellow officers avoided him for fear of association. A previous rating supervisor warned appellant that the employing establishment had hoped that he would explode. Appellant recently reported substantive dangers to Ronald Reagan National Airport's Terminal A and commercial passenger airline cockpits and their pilots during flight, which had been investigated by the U.S. Office of Special Counsel since 2016.

Appellant submitted a May 24, 2016 e-mail and a nondisciplinary letter of counseling that was issued to a supervisory federal air marshal for failing to follow policy. The supervisor had sent an inappropriate video to appellant who showed it to two employees.

Appellant also submitted medical evidence. In a November 28, 2017 report, Dr. Iqbal diagnosed adjustment disorder with anxiety on Axis I, history of supraventricular tachycardia on Axis III, occupational stressors on Axis IV, and a global assessment functioning score of 80 on Axis V. She reported no diagnosis on Axis II. Dr. Iqbal opined that appellant was psychologically suitable to perform the duties and responsibilities of a federal air marshal, which included to be entrusted with national security information and carrying a firearm.

OWCP received an August 12, 2016 letter in which appellant's U.S. congressional representative requested that the administrator of the employing establishment provide documents and communications related to its retaliation against appellant for being a whistleblower and denial of his promotion. It was noted that the MSPB found that the employing establishment had retaliated against appellant when he was removed from employment in 2006 and required him to be retroactively restored, effective April 11, 2006. In June 2015, appellant was reinstated in his former position. He had not received an annual in-position-increase since 2002 despite his supervisor's testimony that his performance was exemplary. Since February 26, 2016 appellant

had been assigned to an empty room with no work duties while he was previously assigned to covert flying missions in the Middle East.

E-mails dated April 21, and June 14 and 24, 2016, concerned appellant's reassignment on April 26, 2016, his lack of work duties, and the scheduling of training, and the denial of his April 13, 2016 request for reassignment following his completion of a detail assignment from February 26 to April 13, 2016. He submitted additional e-mails that either had illegible dates or were dated October 6 through December 7, 2017 addressing appellant's surrender of his firearm and other equipment on October 6, 2017, medical treatment and pay status, restoration of his sick leave, and request to be placed on administrative leave.

By letter dated March 19, 2018, appellant submitted a November 22, 2017 e-mail from Dr. Kathleen Christian, an employing establishment clinical psychologist, with whom he had treated a few days prior. Dr. Christian announced her retirement, noting that she was denied the ability to leverage her experience for the good of federal air marshals and she had realized that she was part of a system that put the emotional well-being of them at risk.

OWCP received additional medical evidence.

By decision dated June 13, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish an emotional condition in the performance of duty, as alleged. It found that he had not established a compensable employment factor. OWCP concluded that the requirements had not been met for establishing an injury as defined by FECA.

On July 12, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 28, 2018. He testified that the employing establishment retaliated against him, and in June 2018 it had issued a second proposed notice of termination. Appellant further testified that an investigation of his retaliation complaint had been launched, as well, as his disclosure that he initially filed in 2003 concerning problematic cockpit security issues. He noted that this investigation resulted in his July 2003 termination. Appellant also testified that he was retaliated against for making protected disclosures as a whistleblower against a special counsel who was arrested in 2006 by the Federal Bureau of Investigations for transferring his lesbian, gay, bisexual, and transgender employees.

By decision dated February 12, 2019, the hearing representative affirmed the June 13, 2018 decision, finding that appellant had not established a compensable employment factor for his emotional condition claim.

On March 13, 2019 appellant requested reconsideration and submitted additional evidence. A December 18, 2018 letter by the U.S. Office of Special Counsel advised appellant that it had transmitted his allegations of gross mismanagement and a substantial and specific danger to public health and safety by employees at the employing establishment to the Secretary of the employing establishment for a report pursuant to 5 U.S.C. § 1213(c).

OWCP, by decision dated June 7, 2019, denied modification of the February 12, 2019 decision.

## **LEGAL PRECEDENT**

To establish an emotional condition causally related to factors of a claimant's federal employment, he or she must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.<sup>4</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to a claimant's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.<sup>5</sup> However, disability is not compensable when it results from factors such as an employee's fear of a reduction in force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.<sup>6</sup>

An employee's emotional reaction to administrative or personnel matters generally falls outside of FECA's scope.<sup>7</sup> Although related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.<sup>8</sup> However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>9</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>10</sup>

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<sup>4</sup> See *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>5</sup> *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

<sup>6</sup> *Cutler*, *id.*

<sup>7</sup> *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>8</sup> *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005); *McEuen*, *id.*

<sup>9</sup> *Id.*

<sup>10</sup> *A.O.*, Docket No. 19-1612 (issued April 8, 2021); *D.I.*, Docket No. 19-0534 (issued November 7, 2019); *T.G.*, Docket No. 19-0071 (issued May 28, 2019).

OWCP's procedures provide:

"An employee who claims to have had an emotional reaction to conditions of employment must identify those conditions. The [claims examiner] must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When an incident or incidents are the alleged cause of disability, the [claims examiner] must obtain from the claimant, agency personnel and others, such as witnesses to the incident, a statement relating in detail exactly what was [stated] and done. If any of the statements are vague or lacking detail, the responsible person should be requested to submit a supplemental statement clarifying the meaning or correcting the omission."<sup>11</sup>

OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.<sup>12</sup> Its procedures further provide in certain types of claims, such as a stress claim, a statement from the employer is imperative to properly develop and adjudicate the claim.<sup>13</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant has attributed his emotional condition to error or abuse in administrative and personnel matters by the employing establishment. He alleged that the employing establishment retaliated against him for making protected disclosures as a whistleblower and prevailing against its appeal of his retaliation case and then being required to reinstate him in his former position at the direction of the MSPB, a federal appeals court, and the U.S. Supreme Court. Appellant contended that the employing establishment failed to provide assistance in processing his claim as it did not submit his paperwork and medical evidence. He also contended that it ordered him to not enter its facilities, placed him on sick leave from October 7 through November 30, 2017 and revoked his agency-issued firearm until he was cleared to return to work after undergoing a directed psychiatric examination. Appellant further contended that a supervisor called him a homicidal racist. Additionally, he asserted that he was not assigned any substantive work duties for six months. Appellant further asserted that he was being investigated by employing establishment criminal investigators for his 2010 protected disclosures concerning a federal air marshal who had a sexual relationship with a deciding official who once terminated him. He also asserted that he was currently in his third involuntary redirected assignment. Appellant claimed that his prior supportive supervisor was demoted. He further claimed that his applications for

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(i) (July 1997). See *G.K.*, Docket No. 20-0508 (issued December 11, 2020); *S.L.*, Docket No. 17-1780 (issued March 14, 2018).

<sup>12</sup> 20 C.F.R. § 10.117(a). See *R.S.*, Docket No. 20-1307 (issued June 29, 2021); *G.K.*, *id.*; *M.T.*, Docket No. 18-1104 (issued October 9, 2019).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7(a)(2) (June 2011); *R.S.*, *id.*; *G.K.*, *supra* note 11; *M.T.*, *id.*

promotions were denied despite being an exemplary officer with an unblemished performance record. Appellant also claimed that his requests for reassignment and to be placed on administrative leave were also denied.

OWCP, in a development letter on December 27, 2017, requested that the employing establishment review appellant's allegations and provide, among other things, comments from a knowledgeable supervisor regarding the accuracy of his allegations. No response was received.

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to OWCP's request for information.<sup>14</sup> As noted, OWCP's regulations provide that an employer with reason to disagree with any aspect of appellant's claim shall submit a statement describing its disagreement with a specific allegation or argument and submit evidence such as witness statements supporting its position.<sup>15</sup> Moreover, its procedures provide that, in emotional condition cases, a statement from the employing establishment is necessary to adequately adjudicate the claim.<sup>16</sup>

Although it is a claimant's burden of proof to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>17</sup>

The case will, accordingly, be remanded to OWCP for further development of the evidence regarding appellant's allegations of error or abuse in the employing establishment's handling of administrative and personnel matters. It shall again request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding his allegations. The employing establishment shall include any reports resulting from investigations, and/or final agency decisions. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant has established an emotional condition in the performance of duty.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>14</sup> S.S., Docket No. 19-1021 (issued April 21, 2021); G.K., *supra* note 11; G.I., Docket No. 19-0942 (issued February 4, 2020); V.H., Docket No. 18-0273 (issued July 27, 2018).

<sup>15</sup> *Supra* note 12.

<sup>16</sup> *Supra* note 11.

<sup>17</sup> See C.K., Docket No. 20-1493 (issued March 29, 2021); G.K., *supra* note 11; R.A., Docket No. 17-1030 (issued April 16, 2018); K.W., Docket No. 15-1535 (issued September 23, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 7 and February 12, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 15, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board